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No. 93-76

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGE CHERREY, *et al.*,
Petitioners,

v.

GERALD DIAZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

When does a civil RICO cause of action under 18 U.S.C. § 1964(c) accrue for the purposes of the four year statute of limitations adopted in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987)?

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Alleck Resnick, Resnick, Sopher & Perlow, P.A. and Bay State Title Company, Respondents,* respectfully pray that the Petition for a Writ of Certiorari submitted by George Cherrey and Kathleen Cherrey be denied.

COUNTER STATEMENT OF THE CASE

Petitioners George Cherrey and Kathleen Cherrey ("the Cherreys") brought suit arising out of their purchase of various rental properties in Baltimore City. The properties were purchased from Respondents Gerald Diaz ("Diaz") and Philip Everson ("Everson"). Respondents Alleck Resnick ("Resnick") and Resnick, Sopher & Perlow, P.A. ("RS&P") were the settlement attorneys who conducted the closing on the sale of the properties. Bay

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* There are no parent companies or subsidiaries relating to Resnick, Sopher & Perlow, P.A. or to Bay State Title Company.

State Title Company ("Bay State") was the guarantee company and Baltimore Savings and Loan Association, F.A. was the mortgagee.

The Cherreys originally responded to a newspaper advertisement advising of the availability of the rental properties for sale. The complaint alleged that Diaz represented that the properties were in good condition, well maintained, continuously rented and inhabited by stable tenants. It also alleged that Diaz promised to repurchase the properties and to assume the mortgages taken out as part of the transaction if the Cherreys had any problems. Without having fully inspected the properties, the Cherreys signed a contract on December 30, 1986. The closing took place on January 30, 1987.

The complaint alleged that in May, 1987, as the original tenants began vacating the properties, the Cherreys came to realize that the condition of the houses did not comport with the representations made by Diaz, nor with the local housing code. However, it was acknowledged in the complaint that one of the properties was vacant from the closing on January 30, 1987 through March, 1987. Despite the vacancy, the Cherreys took no action to inspect this or any of the other properties.

The Cherreys instituted suit on May 15, 1991, after they allegedly became aware of two other couples claiming to have similarly relied on alleged misrepresentations by Diaz and/or Everson relating to the purchase of rental properties in Baltimore City. The suit filed by the Cherreys alleged a civil claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), and various state law claims. However, the district court, in an unpublished decision, dismissed the complaint based on the four year statute of limitations for civil RICO actions adopted in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). The district court held that the civil RICO claim expired prior to the May 15, 1991 filing of the complaint because the Cherreys should have discov-

ered their alleged injury at least by March, 1987, while the one property remained vacant. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirmed in an unpublished, *per curiam* opinion.

SUMMARY OF ARGUMENT

Given the facts and circumstances surrounding this case, no "special and important reasons" exist which merit the Court's review. Furthermore, the alleged facts do not otherwise properly state a claim under RICO and dismissal of the complaint was therefore also warranted on grounds independent of the statute of limitations.

ARGUMENT

Supreme Court Rule 10.1 provides, in pertinent part, as follows:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Sup. Ct. R. 10.1. The Court should deny the Cherreys' Petition because there are no "special and important reasons" to review this case.

This case involves a dismissal of a private, civil RICO claim on limitations grounds. The decision of the district court was unpublished, as was the Opinion of the Fourth Circuit which affirmed *per curiam*. Under the facts alleged in the complaint and necessarily assumed as true by the lower courts, the Cherreys purchased various rental properties virtually sight unseen based on misrepresentations made by the sellers, including the open-ended promise by the sellers that they would rescind the deal should the Cherreys have any problems in the future. The Cherreys thereafter failed to inspect the properties in a timely fashion, even though one of the properties remained vacant for months after the closing.

In addition, the Cherreys entered into a binding contract to purchase the properties on December 30, 1986. At that time, the Cherreys had never met or otherwise had any contact with any of the Respondents, with the exception of the sellers, Diaz and Everson. Nevertheless, the Cherreys sued Resnick, RS&P and Bay State based on vague and conclusory allegations that they were somehow involved in a scheme to defraud. The RICO aspect of the claim arises merely out of the Cherreys' alleged, subsequent discovery of two other couples who claim to have been defrauded in a similar fashion.

Given the facts and circumstances underlying the Cherreys' RICO claim, it cannot be seriously argued that this case presents "special and important reasons" which warrant the Court's attention and review. Even assuming a split in the circuit courts of appeal on the accrual issue, this case simply does not present the proper forum for that issue to be decided. It would clearly be inappropriate in this context to consider the massive and unwarranted expansion of civil RICO liability contemplated by the Cherreys.

Moreover, the dismisal of the Cherreys' RICO claim is supported on grounds independent of the statute of limitations. These additional grounds were included in the briefing papers submitted in support of the motions to dismiss filed by the various Respondents.

In particular, the complaint failed to allege any facts supporting the underlying claims of mail fraud and wire fraud against Resnick, RS&P and Bay State. Furthermore, the Cherreys had already entered into the contract to purchase the rental properties before ever having had any contact with Resnick, RS&P and Bay State. It therefore cannot be argued that Resnick, RS&P or Bay State somehow fraudulently induced the Cherreys to enter into the contract.

The complaint also failed to sufficiently allege a "pattern of racketeering activity." A "pattern of racketeering activity" requires the commission of at least two predicate

racketeering acts within the last 10 years. *See* 18 U.S.C. § 1961(5). Additionally, in order "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original); *see Myers v. Finkle*, 950 F.2d 165, 169 (4th Cir. 1991).

The Cherreys' reliance upon the claims of the two other couples to prove its RICO claim is misplaced. Those isolated, alleged events do not establish the existence of related predicate acts. They also do not suggest the threat of continued criminal activity. The allegation that these other couples may have likewise failed to properly inspect the subject properties or unreasonably relied upon representations by the sellers simply does not constitute a RICO "pattern."

CONCLUSION

For the reasons set forth above, Alleck Resnick, Resnick, Sopher & Perlow, P.A. and Bay State Title Company, Respondents, respectfully request that the Petition of George Cherrey and Kathleen Cherrey for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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